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The Court's jurisprudence on free movement of goods : pragmatic presumptions, not philosophical principles

GARETH DAVIES *

Recent cases on the free movement of goods have established that restrictions on the use of goods may be measures equivalent to a quantitative restriction on imports, contrary to the Treaty. [1] The apparent logic is simple : if people cannot use goods, they will not buy them, and so where such goods are made abroad they will cease to enter the state in question. [2]

These cases have attracted some attention, as an apparent broadening of the case law on free movement of goods. [3] In particular, in several of the cases – not the older ones, and not the newer ones, but the ones in the middle – the Court built its reasoning in the cases around the phrase "market access", suggesting that a hindrance to market access, whether discriminatory or not, is always caught by Arti-

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1 Case C-433/05 Lars Sandström [2010] ECR I-2885; C-110/05 Commission v Italy [2009] ECR I-519; Case C-142/05 Mickelsson and Roos [2009] ECR I-4273; Case C-265/06 Commission v Portugal [2008] ECR I-2245; Case C-142/09 Lahousse judgment of 18th November 2010.

2 See especially C-110/05 *Commission v Italy* [2009] ECR I-519; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273;

3 E.g. L. W. Gormley "Free Movement of Goods and their Use. What is the Use of it?" (2011) 33(6) Fordham International Law Journal 1589-1628; L. Prete, 'Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck' (2008) 35 Legal Issues of Economic Integration 133–155; P. Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05' (2009) 36 Legal Issues of Economic Integration 257–272; T. Horsley, Annotation, (2009) 46 Common Market Law Review 2001–2019; E. Spaventa "Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos" (2009) 24(6) European Law Review 914-932. P. Wenneras "Selling arrangements, keeping Keck" (2010) 35(3) European Law Review 387-400 regards the cases as less innovative. Also on these cases, in broader context, see J. Snell, "The Notion of Market Access: A Concept or a Slogan?" (2010) 47 Common Market Law Review 437–472; I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) 21 European Business Law Review 705–760.

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cle 34. [4] That invitingly open formulation looks as if it goes beyond *Cassis de Dijon* and *Keck*. [5] Is the restrictive phase in free movement of goods which Keck ushered in therefore coming to an end? Is the attachment to discrimination or anti-protectionism as a guiding principle for the law being replaced by the further-reaching market access? Is the Court changing its mind about something important? It is tempting to think so.

This article makes three criticisms of the story suggested above. Firstly, one should not attach too much weight to the Court's phraseology. EU law provides a particularly sterile ground for close linguistic argument. Judgments are too short, the Court too communicatively challenged, and policy too dominant for the finer points of language to provide a good framework for predicting outcomes. Patterns in the outcomes of judgments, and the policy ideas they embody, give us a better idea of what to expect in the future than does the literal meaning of the words of the Court. Moreover, when the Court uses concepts like market access and discrimination it does so in imprecise and inconsistent ways anyway, and has never provided a determinate or convincing definition of market access at all. [6] This phrase functions as a label for a result more than as a substantive step in a reasoning process. [7]

Secondly, if one looks at the concrete implications of the use cases it amounts to a lot less than the rhetorical flourishes in the judgments might suggest. [8] Only one of the cases adds anything new to the law – *Sandström* – and it is not clear exactly how much this addition amounts to. [9] However, whatever the scope of the novelty is, it can be better explained in terms of particular factual perceptions about the effects of use rules, than in terms of changing judicial perceptions of what the market is for or about.

Thirdly, it is in general a mistake to understand the Court's decisions as choices between fundamental principles. To do so suggests that when it formulates the law it is seeking to state the econo-philosophical essence of trade freedom, and apply this essence in a direct and unmediated way. On the contrary, it is suggested here that the Court has shown a consistent and entirely appropriate indifference to the grand philosophical scheme of things, about which there is not that much for a lawyer to say : it will be suggested that a combination of textual, political, economic and constitutional fac-

4 Case C-433/05 *Lars Sandström* [2010] ECR I-2885; C-110/05 *Commission v Italy* [2009] ECR I-519; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273. See also Case C-108/09 *Ker-Optika*, judgment of 2nd December 2010, where the phrase returns in the context of a selling arrangement.

5 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649; C-267 & C-268/91 *Keck & Mithouard* [1993] ECR I-6097.

6 See Lianos; Wenneras; both supra.

7 Snell, supra.

8 Lianos ;Wenneras; both supra,

9 Case C-433/05 *Lars Sandström*, supra.

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tors means that there is very little realistic wiggle room for the Court on this issue. The big ideational framework of the market is a done deal, and what the case law on free movement does, and seeks to do, is not to develop or challenge this, but to translate it into pragmatic presumption and rules which can be used by lawyers and courts. The rules and principles stated by Court are far better understood as embodying a series of compromises, perceptions of fact, and pragmatic approximations which aim to deal with the problems of evidence, workload, and legal clarity, rather than as an ongoing monologue about market philosophy. Looking in the case law for a coherent framework addressing these classical judicial concerns is, it will be argued below, quite fruitful. Looking in the case law for clear or consistent guidance about the conceptual foundations of economic integration is, as internal market lawyers know, a hopeless cause.

I. – The conceptual basis of free movement

The evil which Article 34 addresses is the exclusion of foreign products from a national market. Measures which could be thought to have this effect may be divided for convenience into two groups. The first group excludes imports to a greater extent than it suppresses sales of competing domestic products. It has a discriminatory or protectionist effect. The second group consists of measures which impose a market-wide regulatory burden, depressing sales generally, but do not reduce sales of imports any more than sales of competing products are depressed.

The debate about market access in free movement can be summarized in the following terms : should measures which depress sales of some product generally, but have no protectionist effect, be seen as restrictions on free movement contrary to Article 34? [10]

The arguments in favour are two, one literal, and one policy based. The literal one is this : if sales of imports are reduced, then imports are reduced, and so the effect is the same as a quantitative restriction. [11] Q.E.D. Nothing more needs to be said. The policy one is this : courts contribute to European well-being by setting aside rules which serve no useful purpose but inhibit (welfare-enhancing) cross-border economic activity. [12] That argument acquires extra force if one believes, as many do, that Europe is generally over-regulated.

The arguments against are somewhat more substantial. The clear intention of the text of Article 34 is to capture measures which specifically affect cross-border movement,

[10] See Advocate General's Opinion in Case C-292/02 *Hünermund* [1994] ECR I-6787.
[11] See Advocate General's Opinion in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 39.
[12] Ibid, paragraph 40.

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that is to say which have some effect on imports over and above any domestic effect. This is what a quantitative restriction does – a protectionist measure par excellence – and so, logically, should be what a measure of equivalent effect should do. Moreover, the internal market is consistently understood throughout the Treaty in terms of an area of equal and undistorted competition – a level playing field for competitors and consumers. [13] Harmonisation and competition law both aim at this goal. Free movement law is part of the structure of the internal market, that part which removes barriers to movement, and so should also be guided by this market equality goal. It is fair and open competition between domestic producers and importers which is the point, not maximizing total sales as such. This is also how economists approach free trade and competition. A barrier to entry is understood by competition theorists to be something which creates an asymmetry between incumbents and would-be entrants, not merely a regulatory burden as such. [14] Free trade is understood to be trade on equal terms, not trade at any particular level of regulatory intensity. That is also how the WTO approaches its free trade law, in which equality and non-discrimination are the cornerstone of its application. Article 34 is famously modeled on the GATT. [15]

More practically, if a mere impact on sales of imports is sufficient to engage Article 34 then the article is almost unbounded, since everything from income tax rules to reform of housing markets and environmental rules protecting natural parks may have this effect. It is manifestly the case that this was not the intention behind Article 34, nor does its text suggest such a broad application, and nor would it be politically sustainable in the context of the EU.

Neither does either of the arguments apparently in favour of this broad approach withstand scrutiny. The literal argument ignores the fact that quantitative restrictions have an unequal effect, making it implausible to argue that measures lacking that inequality are "equivalent". This is not some pedantic point : the difference in effect between a market wide regulatory burden and a protectionist one is economically and socially important. One diverts trade and distorts competition, the other does not. One reflects and embodies a collective preference for protectionism, and one for some non-protectionist goal, whether consumer protection, the environment or merely clear and strict rules. To call them equivalent is like saying that reducing subsidies for public transport is equivalent to the imposition of a curfew for teenagers because both lead to decreased mobility.

Moreover, if the literal argument is phrased in terms of market access then it becomes incoherent. Access to what? Market definition is prior to access. Regulation

13 See Articles 101, 107, 111, 114 TFEU; Protocol 27 to the TFEU.

14 See discussions in G. Davies "Understanding Market Access" (2010) 11 German Law Journal 671-704; Snell;Lianos; both supra.

15 Article XI GATT.

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is part of what defines the market. It is that market to which access must be permitted. Litigants who challenge non-protectionist regulation are not in fact claiming that they are denied market access. They are claiming that a different market should exist. To which one is tempted to respond "and people should be nice to each other, and it shouldn't rain on Saturdays". Their argument only has persuasive force if they can show that there is some illegitimacy in the way the market is defined. To claim that the illegitimacy lies in the fact that their sales are reduced is circular. They are assuming the norm they want to establish. This is why market access is indeed no more than a slogan. [16] If they can show protectionism in the market definition, then both Article 34 and the Treaty ban on discrimination provide clear support for a claim that national markets should not be defined in this way. Absent that, however, a claim that sales-reducing non-protectionist regulation is a restriction on market access contains neither an argument nor even a coherent semantic structure.

The policy argument is worse. Quite apart from the fact that Article 34 is not written as a prohibition on disproportionate regulation of economic activity, there is absolutely no economic consensus that it would be desirable to use Article 34 to address over-regulation. [17] The extent to which over-riding local preferences is efficient is still hotly contested, while alongside the issue of the substantive rule in question one must always consider the economics and politics of federalism : the desirability of allocating power to a particular level, irrespective of the "good sense" of what they may do with it. [18] Wisdom is not a sufficient justification for the exercise of power. A deregulatory use of Article 34 is not a bending of the rules in the pursuit of an uncontested good, but a setting aside of the text of the law in favour of a particular political agenda. It is an attempted coup d'état.

Not that Article 34 can even be effective in achieving this goal. Because it only applies to the cross-border – and this is accepted, if not always happily – wherever it is applied to rules that lack a protectionist effect it has the consequence of creating a competitive advantage for importers. [19] Instead of all sales being reduced, importers are protected while domestic producers continue to suffer the burden. This is what the Court calls a distortion of competition, and what social lawyers would call "positive action" or

16 Snell, supra.

17 M. Gal and I. Faibish, "Six Principles for Limiting Government-facilitated Restraints on Competition" (2007) 44 Common Market Law Review 69; W. Kerber and R. van den Bergh "Mutual Recognition Revisited: Misunderstandings, Inconsistencies, and a Suggested Reinterpretation" (2008) 61 Kyklos 447-465; R. van den Bergh "Towards an Institutional Legal Framework for Regulatory Competition in Europe" (2000) 53 Kyklos 435-466.

18 Kerber and van den Bergh; van den Bergh; both ibid.

19 G. Davies "Is Mutual Recognition an Alternative to Harmonisation? Lessons in Tolerance and Trade from the European Union for the WTO and other RTAs" in F. Ortino and L. Bartels (eds.) *Regional Trade Agreements and the WTO* (OUP, 2006) 265-280.

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"affirmative action" for importers. One may continue the analogy; just as there are disproportionately many men in boardrooms, there are disproportionately many domestic firms in national markets. Hence, presumably, proponents of a free movement law that goes beyond anti-protectionism would like to see positive action for importers in order to address this, for that is what their interpretation of the Treaty amounts to. It is a shame that the argument is not made more openly. It would hasten its demise. [20]

It is usually accepted that applying the Treaty to all measures which reduce sales of imports would be impractical and undesirable. One middle path would be to apply it only where a measure has a significant or substantial impact – limiting it to regulatory burdens that really impact on imports, not just those that shave a few percent off profits or sales. [21] On this approach there would be no need to show any protectionist effect, just a significant effect on imports.

A series of criticisms can be made of this. Firstly, it cannot work without an additional directness criterion – income tax and housing policy can have major impacts on sales of some kinds of goods (new cars, kitchens, carpets… anything expensive). Such a directness criterion would have the ironic effect that it would turn a test intended to reflect economic realities into something highly formalist and precisely decoupled from economic substance – there is no difference, from the importer's perspective, between measures which reduce sales by direct (raising costs) or indirect (reducing consumer income) means. More seriously, it still lacks any logic or basis in written law. However distressing for an importer it may be to see his customer base wither away because of strict laws which have the effect of raising the price of his goods or making them less available, if the same effect, to the same extent, is experienced by domestic competitors then, for the reasons given above, there is still no reason to regard this as equivalent to a quantitative restriction.

The real function of such a test is as a presumption, an allocation of the burden of proof. The presumption that any regulation reducing sales of imports is protectionist is implausible and unworkable. The presumption that regulation significantly reducing sales of imports is protectionist may more often be the truth. The presumption that regulation which entirely prevents sale of certain imports is protectionist may have much to be said for it. The presumptions must be rebuttable – it may just be that the state has chosen for strict market-wide non-protectionist regulation for some good reason. But states gener-

[20] See G. Davies "Discrimination and beyond in European social and economic law" (2011) 18 Maastricht Journal of European and Comparative law, 17-38.

[21] J. Steiner, "Drawing the line: uses and abuses of Article 30 EEC", (1992) 29 Common Market Law Review 767; S. Weatherill, "After Keck: Some thoughts on how to clarify the clarification", (1996) 33 Common Market Law Review 885; Advocate General's Opinion in *Leclerc-Siplec*, supra. For critique: E. Spaventa, "From Gebhard to Carpenter: Towards a (non) economic European constitution", (2004) 41 Common Market Law Review 743.

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ally like economic activity, so it is at least arguable that where sales are hit hard there is enough reason for a court to take a look and see if something wrongful is going on.

Such presumptions are what the case law is about. There are no real choices about the underlying basis : the law aims to remove measures which have a protectionist effect and serve no other good goal. However, identifying these can be hard. Whether a measure impacts on imports more than on domestic sales requires establishing which goods are in competition with each other (defining the market) and then measuring sales over a certain period, and then considering whether other factors, such as new design or good marketing could be responsible. Inequality may be inherent and easily visible in some cases, but it will not be so in all. As we can see from competition law, if market effects are to be the basis of the law, and that is to be taken seriously, then empirical market investigation becomes the heart of the legal process.

This would be a disaster. Competition law is largely a game played between large companies and the government, and the choice to pay for economic reports is one that they all broadly agree on. Good luck to them, the free movement lawyer may think. Free movement law is more often about the smaller actor and the state, litigated in lower courts, and if it is not accessible and reasonably speedy and affordable then it will become ineffective law. Market investigation as a standard part of the free movement litigation process is not a viable option.

As an alternative, the Court has developed a series of categories and presumptions broadly corresponding to the goal of eliminating unjustified measures with a protectionist effect. It has devised rules which often do not explicitly refer to this goal, but nevertheless fit it reasonably well, while maximizing the efficiency and clarity of the legal process. The claim below is that looking at the cases as compromises between anti-protectionist principle, clarity and judicial efficiency provides a more consistent and plausible explanation of the law than can be obtained by seeing them as direct expressions of basic free movement philosophy, as repeated choices between anti-protectionism or deregulation. If viewed as the latter the Court appears to vary its philosophies somewhat randomly, and express none of them clearly. If viewed as the former, the Court appears to be just dealing with new situations in practical ways.

II. – Categorising measures

In *Dassonville* the Court restated Article 34 in other terms, but did not attempt to divide the kinds of measures that might fall within it into different groups. [22] On the contrary, its simple and all-encompassing restatement could be seen as an attachment

[22] 8/74 *Dassonville* [1974] ECR 837.

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to the idea that MEQRs were in fact a coherent and homogenous set of measures. These were early days in the free movement of goods, and perhaps a single approach to all trade restricting measures seemed plausible then.

The first deviation from this global approach was in *Cassis de Dijon* where the Court introduced a specific doctrine concerning the kinds of measures now referred to as product rules, or product standards. [23] It introduced a presumption that application of these to imports was unlawful, unless the state could rebut this by demonstrating necessity on some non-trade-related grounds. It put the burden of justification firmly on the state, and has since made it work quite hard to meet that burden. [24]

Product rules are an inevitably and highly protectionist form of regulation. They are a total prohibition on sale of a particular kind of product. However, what adds the sting is that this kind of product will invariably be made abroad, since local producers almost always adapt to local legislation. [25] The competing domestic product will therefore not be affected by the prohibition. This is a protectionist effect in a most pure form; define what may be sold in a way that best matches what is made locally.

Where new product standards are introduced there may be a brief window of equal effect, as all market actors including domestic ones are affected. However, the economics of adaption to the new standard are likely to be different for the producer in its home market than for the importer. [26] It will rarely be long before local production conforms, while many foreign producers and products continue to be excluded, since the role of that national market in their sales may not justify adaption.

Thus in practice, standards have the effect of walling markets off and protecting national incumbents. The presumption of illegality is amply justified by a concern to prevent protectionism, and the only real issue in the law here is the intensity with which such justifications should be reviewed. [27] If the Court has tended to be quite unjudicial in its second-guessing of the legislator where product standards are concerned, then – without dismissing this criticism – it can at least be partly explained by the intensity of the protectionist effect that such rules have.

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23 120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649;

24 See e.g. L.W. Gormley , "The Consumer Acquis and the Internal Market" (2009) 20 EBLRev 409 ; H. Unberath and A. Johnston , "The Double-headed Approach of the ECJ Concerning Consumer Protection" (2007) 44 CMLRev 1237 ; S. Weatherill , "Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation" (1999) 36 CMLRev 51.

25 J. Pelkmans, "Mutual recognition in goods and services: An economic perspective", (2003) ENEPRI working paper no. 16; A.O. Sykes, "The (limited) role of regulatory harmonization in international goods and services markets", (1999) Journal of International Economic Law 49; A. Jones and B. Sufrin *EC Competition Law* (OUP, 2008) at 88-92.

26 Ibid.

27 See note 24 above.

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Selling arrangements, by contrast, are quite different. This was the second category of rule that the Court introduced, in *Keck*, and it took a reverse approach. [28] Here the presumption is of legality, unless the claimant can show protectionist effect. If he can, the presumption reverses, unless the state can once again show necessity on some non-trade grounds.

Continuing the mirror image of *Cassis*, where selling arrangements are concerned the Court has also been reluctant to see its initial presumption disturbed. It has not been quick to find that there is in fact a protectionist effect, although in recent years it has softened somewhat on this. [29] On the contrary, it has seemed generally inclined to stick to the basic rule that selling arrangements are to be left alone.

Actually, rules concerning the way things are sold will probably have some protectionist effect a lot of the time. The rule in *Keck* certainly will have – selling at a loss is an archetypal way to break into a new market – so that case should have fallen within its own proviso. A similar point may be made about the facts of *Hünermund* and *Leclerc-Siplec*, cases decided around the same time as *Keck* which both concerned advertising restrictions laid down by national law. [30] In general, restrictions on advertising help incumbents resist new entry. In static and national markets removing the possibility of advertising will tend to help national market actors resist competition from foreign would-be market entrants. It is at least arguable that both cases should have fallen within the *Keck* proviso. It may be that the national court ultimately found this to be the case, and the Court did not rule it out absolutely, but it certainly gave no hint of enthusiasm or support for this path in its judgments.

Why is the Court, normally so bold, here so reticent? The answer, it is suggested, is to do with the socio-cultural-economic nature of many selling arrangements. [31] Most of these rules may have a protectionist effect, but it will be a relatively mild one, an obstacle to market entry rather than a blockage. That suggests that protectionism is unlikely to be the reason for their existence. Rather, they are likely to be reflections of collective preferences concerning other matters. Restraints on Sunday trading, adver-

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28 Joined Cases C-267 and C-268/91 *Keck & Mithouard* [1993] ECR I-6097.

29 Case C-391/92 *Commission v Greece* [1995] ECR I-1621; Joined Cases 69/93 and 258/93 *Punto Casa* [1994] ECR I-2355; Case C-419/93 and others, *Semeraro* [1996] ECR I-2975 But see also more recently: Joined Cases C-34 to C-36/95 *De Agostini & TV Shop* [1997] ECR I-3843; Case C-254/98 *Heimdienst* [2000] ECR I-151; Case C-20/03 *Burmanjer* [2005] ECR I-4133; Case C-441/04 *A-Punkt Schmuckhandels* [2006] ECR I-2093; Case C-322/01 *Deutscher Apothekerverband v DocMorris* [2003] ECR I-14887; see also Case C-71/02 *Karner* [2004] ECR I-3025. The softening is probably because of a burst of cases on distance selling, where the disparate impact was too manifest to avoid. The importance in particular of the internet invites a rethink of whether the *Keck* presumption should be narrowed in some way.

30 Case C-292/02 *Hünermund* [1994] ECR I-6787; Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179.

31 See Case C-145/88 *Torfaen Borough Council* [1989] ECR 3851.

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tising, and shop opening hours are essentially about the texture of society, collective lifestyle, and the values which we wish to see reflected in the law. [32] Trade consequences are a side-effect.

The problem with these kinds of justifications is that they are hard for a court to second-guess. Health, environmental harm, and even consumer protection – in its rather literal product standard sense – are fairly concrete matters compared with the interests embodied in the kinds of selling arrangements mentioned above. If one thinks that declaring a product standard to go further than necessary is straining the limits of the judicial role, then second-guessing the legislator on when shops should be open and where and when advertising should be shown would be taking that function to a whole new quasi-legislative place.

Hence a good reason for the Court to avoid selling arrangements, despite the probability of a protectionist effect in many cases, is that states will always win anyway. These rules will have been adopted for reasons that are authentic, legitimate, culturally specific, complex, hard to plausibly rewrite (instead of closing all day Sunday, wouldn't closing at lunchtime be more proportionate?) and hard to rebut. They have all the ingredients that give the legislator the edge over the judiciary. Courts will be forced to concede justification, and allow the rules to remain. [33]

Keck is thus an entirely insignificant case from the point of view of outcomes. If selling arrangements were prima facie MEQRs they would still survive, but there would be a lot more pointless litigation. Indeed, as is widely noted, this is precisely the prehistory of *Keck*. [34] That judgment did not reflect any new approach to principle or the market, but the Court's pragmatic realization that it was wasteful to go after a whole bunch of measures that it was going to end up having to leave in place anyway. It is a case about judicial efficiency and workload; no more but no less.

Now we have the cases on use. [35] In terms of their effects rules concerning the use of goods are somewhere between product rules and selling arrangements. A ban on use, as in most of the cases, has an intensity of effect which will rarely be reached by selling arrangements. However, mere restrictions on use will tend to be, like many selling arrangements, mere market-depressors, usually lacking the selectivity or protectionist effect of the product rule. Most use restrictions will, unlike product rules, apply across a complete product market – to all cars, trailers, motorized recreational water vehi-

[32] See e.g. *Torfaen*, ibid; Case 155/80 *Oebel* [1981] ECR 1993; Case C-169/91 *Stoke on Trent and Norwich City Council* [1992] ECR I-6635; Joined Cases C-312 and 332/89 *Conforama/Marchandise* [1991] ECR I-1027; *Hünermund*, supra;; Joined Cases 60 and 61/84 *Cinéthèque* [1985] ECR 2605.

[33] C. Barnard *Substantive Law of the EU* (OUP, 2010, 3rd edition) at 119.

[34] Note 32 above.

[35] Note 1 above.

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cles – and would generally be a rather ineffective attempt at protectionism. They will therefore probably have been adopted for genuine reasons. On the other hand, these reasons are, if the current cases are a guide, likely to be quite concrete and simple and amenable to judicial review – safety, noise, environmental harm, and so on, by comparison with the social subtleties of the advertising law. What then would be a reasonable presumption to adopt with respect to these types of measures?

With mere restrictions, it is suggested that the lack of any inevitable protectionist effect, the implausibility of protectionist motive, and the high likelihood of good reasons, would support a presumption of legality, to be rebutted by evidence of protectionist effect, to be rebutted in turn by evidence of necessity. A *Keck* approach, in short.

With total prohibitions on use one could plausibly defend the same approach. However, prohibitions have distinctive consequences. Firstly, by contrast with mere restrictions, they are more likely to have the effect of diverting customers to competing products, and that raises the question whether this diversion is of a protectionist nature. Secondly, such bans will be politically hard to adopt if there is significant local production, making it plausible that bans will tend to be imposed where it is imports that are primarily hurt. Thirdly, even if domestic industry is initially affected, it will typically either adapt to make permitted competing products or withdraw from the now non-existent market, so that as with a product rule, the measure will then affect only would-be importers. [36] There are good reasons to think that where a prohibition on use of a product is imposed, a protectionist effect may not be far away, and that a state should be asked to explain and justify its regulatory choice.

The cases themselves are, taken as a whole, somewhat ambiguous. The trailers case, usually considered to be the leading one, and the tinted window films and moped cases all concerned a total prohibition on the use of the product in question. [37] This fact, and the fact that sales were essentially reduced to zero so that the measures amounted to a de facto prevention of sales, was prominent in the judgments.

Mickelsson and Roos and *Sandström* both concerned a Swedish reluctance to permit the use of jet-skis on inland waterways. [38] In the first of these the Court uses the broadest reasoning of all the cases, finding that a "restriction on use" may fall within Article 34 because of its "considerable influence" on consumers. [39] However, it expands this to

[36] See note 25 supra.

[37] C-110/05 *Commission v Italy* (trailers) [2009] ECR I-519; Case C-265/06 *Commission v Portugal* (tinted window film) [2008] ECR I-2245; Case C-142/09 *Lahousse* (moped accessories) judgment of 18th November 2010.

[38] Case C-433/05 *Lars Sandström* [2010] ECR I-2885; Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273;

[39] *Mickelsson*, ibid, paragraph 26.

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say that consumers have only a "limited interest" in buying the product. [40] While this is clearly a less dramatic impact than in the trailers case, where consumers had essentially no interest at all in buying the product, it is still something quite severe. In the judgment it emerges that as a result of various considerations the possibilities for using a jet-ski in Sweden were "merely marginal". [41] This is not quite a total prohibition on use, but it is perhaps closer to that than to mere regulation of use. There was something like a quasi-ban in place.

In *Sandström* the situation had softened somewhat. The authorities had designated certain areas where jet-skis could be used, but clearly not enough to satisfy Mr Sandström who was prosecuted for riding his jet-ski outside of these. If mere restriction of use is an MEQR one would have expected the Court to repeat one of its well-used formulations along the lines that provided the restrictions were justified by environmental concerns and proportionate they were not contrary to Article 34. At one point in the judgment it does appear to say this. However, the judgment suggests that Member States may themselves freely determine what is required by environmental protection, and requires jet-ski restrictions to be tested against these national rules rather than some objective or EU concept of environmental protection. [42] This is more like a due process requirement than a substantive constraint on national policy. Moreover, the situation was complicated by the fact that Directive 94/25 requires Member States to allow the sale and "putting into service" of jet-skis in their territory. [43] Any restrictions on use have to be read in the light of this too. *Sandström* does suggest that mere restrictions on use are, or can be, MEQRs, but its complex facts and the usual abbreviated reasoning mean that it will take another restrictions-on-use judgment to establish this beyond doubt.

III. – Extending the law or applying it?

The notion of an MEQR has always been about prohibitions. From *Dassonville*, to product standards, to *Commission* v. *Italy*, the cases which define what an MEQR is have concerned national measures which entirely prevent a certain product from being sold in the national market. In *Keck*, where the Court finds that selling arrangements are not MEQRs it does so precisely because they do not prevent sale, and do not hinder it unequally. Much attention has been lavished on the latter part of this, the *Keck* proviso, but the implication is also there that if a selling arrangement did, by some strange

40 Ibid, paragraph 27.
41 Ibid, paragraph 25.
42 *Sandström*, note 38 above, paragraph 38.
43 Article 4(1) Directive 94/25 OJ 1994 L 164, p. 15.

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means, amount to a de facto prevention of sale, it too would be an MEQR. The cases concerning prohibitions of use are merely a logical extrapolation of the case law to a new situation. [44]

However, the other side of the established case law is that measures which merely depress sales, and have no protectionist effect, have never been found contrary to Article 34. Where Keck is applied this is an a priori result of a rule, whereas where *Dassonville* is applied it is merely an observable feature of the case law; one way or another in all the cases where states lose there is evident protectionist effect. [45]

Sandström challenges this. It allows even non-protectionist sales-reducing measures to be challenged, potentially turning Article 34 into a tool of pure affirmative action. That would be outrageous and regrettable. However, it is far too early to say that it will occur to any non-trivial extent. Absence of justification is a good proxy for protectionist effect; if measures have a demonstrable effect on imports, and states cannot produce a good reason for their rules, then the case stinks : presuming protectionism may well be fair.

Turning this around, where there is no protectionism, there is probably a good reason. Thus it remains to be seen whether any challenges to non-protectionist legislation will actually be won. The history of cases decided on the basis of *Dassonville* suggests that the deregulatory harvest may be meagre. [46] In *Sandström* itself the Court appeared to adopt a very light touch review, and while formally leaving the decision to the national court it showed no objections itself to the measures. [47] If the next ten cases on restrictions on use also concern apparently sensible national rules – as it is suggested is likely – then we may expect the Court to take a *Keck*-like approach and adapt its presumptions, making it harder to bring such cases in the future. If the next ten produce a rich crop of arbitrary or protectionist legislation, then a broad approach to inclusion within Article 34 will probably be entrenched. There is room for uncertainty about which will happen, and therefore it is not particularly surprising that faced with its first cases on restrictions of use the Court takes a cautiously welcoming approach, without laying down any very clear or hard rules which might tie its hands in the future.

44 Wenneras, supra; Lianos, supra.

45 It is hard to prove a negative. This author has been unable to find any exceptions to this. See generally G. Davies *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003) 60-69. See also discussion in Lianos, supra.

46 Ibid.

47 *Sandström* paragraphs 35-40.

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Conclusion

If states adopt measures which impact on imports, and they cannot explain what they are doing in a convincing way, then what on earth is going on? The history and study of European integration suggests that a presumption of a protectionist effect, if not always protectionist intention, is eminently defensible. Are jet-skis made in Sweden? Would Swedish authorities have been so reluctant to designate anywhere where these could be used if there was an important Swedish manufacturer? The absence of justification is not a perfect proxy for a protectionist effect, but it is likely to be a good one, and it is far more efficient to ask whether a rule is sensible than to start investigating the market.

This emphasis on protectionism may seem artificial. Why not just take the rhetoric at face value : anything which hinders market access is an MEQR? Apart from the policy incoherence, the constitutional unacceptability, and the logical nonsense of that claim, it provides a terrible explanation of the law. It does not offer, as they say, a theory. What does market access mean : anything that reduces sales? What about income tax? If there is a directness criterion, why does the Court not mention it? Most of all, why is it that all the cases where a measure was found to violate Article 34 concerned evident protectionist effect? By contrast, a "theory" which says that the Court is guided by a more or less subliminal dislike of protectionism translated into practical and efficient rules offers a picture which is acceptable, plausible, and fits the facts. It looks, in summary, something like this :

First, broadly divide measures into groups which are overwhelmingly likely to have a protectionist effect, and those which are not. That avoids an excessive case load. Then, let the other side have a chance to reply, either rebutting the non-protectionist claim with evidence, or finessing the protectionist claim with a non-trade justification. That obligation scares away unmeritorious litigants and is also a nod to the underlying principles. Then, when faced with a new category of measures, not yet encountered, do not rush to categorise them. Use generalities and common sense for the first few cases until a pattern appears, and then state what the working presumptions should be. So has it gone in the past, and let us hope that it continues so to be.